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09/722,878	11/27/2000	Eric Christian Hince		6077

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EXAMINER

MEDLEY, MARGARET B

ART UNIT

PAPER NUMBER

1714

DATE MAILED: 04/24/2003

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Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/722,878

Applicant(s)

HINCE, ERIC CHRISTIAN

Examiner

Margaret B. Medley

Art Unit

1714

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-47 is/are pending in the application.
- 4a) Of the above claim(s) 19, 20, 35, 36 and 39-47 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-18, 21-34 and 37-384 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_
- 4) ☐ Interview Summary (PTO-413) Paper No(s) \_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

### DETAILED ACTION

This action is in response to Paper No. 8 dated February 4, 2003. The amendments to the title, and claims 1, 14, 31, 37 and 38 have been entered of record. The pending claims of record are 1-47. Claims 19-20, 35-36 and 39-47 are withdrawn from consideration as being drawn to the non-elected invention and have not been treated on the merits.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-2, 4, 13-14 and 37-38 remain for reasons made of record in Paper No. 6 dated October 4, 2002 as being rejected under 35 U.S.C. 102(b) as being clearly anticipate by Gago 4,470,839.

Applicants further claim a dry mixture of discrete particles which is anticipate by Gago teaching that the evaporation can be carried out at the same time and in the same enclosure as the spraying, e.g. a fluidize bed, providing for a dry mixture of discrete particles; column 5, lines 3-15. Patentee further teaches that the particles can be manufactured by dry-mixing fine particles of peroxide and of a coating agent in the desired proportions, column 4, and lines 15-18. The dry mixing can be carried out in any known manner, column 4, and lines 18-19. In light of the above teaching, it is clear that Gago anticipates the present claims.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

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(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-4, 7-8, 13-14, 17-18 and 37-38 for reasons made of record in Paper No. 6 dated October 4, 2002 and for reasons set forth above remain rejected under 35 U.S.C. 103(a) as being unpatentable over Gago 4,470,839.

Applicant further claim a dry mixture of discrete particles, which claimed invention, is arrived at by the teachings of Gago by the dry mixing step set forth above and that is not repeated herein.

Claims 5, 11-12 and 15-16 for reasons made of record in Paper No. 6 dated October 4, 2002 and for reasons set forth supra remain rejected under 35 U.S.C. 103(a) as being unpatentable over Gago 4,470,839 as applied to claims 1-4, 7-8, 13-14, 17-18 and 37-38 above, and further in view of Felix et al (Felix) 5,725,885.

Applicant further claim a dry mixture of discrete particles, which claimed invention, is arrived at by the teachings of Gago by the dry mixing step set forth supra and that is not repeated herein.

Claims 6, 9-10 and 21-34 for reasons made of record in Paper No. 6 dated October 4, 2002 and for reasons set forth supra remain rejected under 35 U.S.C. 103(a) as being unpatentable over Gago 4,470,839 in view of Felix et al (Felix) 5,725,885 as applied to claims 1-5, 7-8, 11-18 and 37-38 above, and further in view of Frisey 3,796,637 and Gaffer et al (Gaffer) 5,648,064.

Applicant further claim a dry mixture of discrete particles, which claimed invention, is arrived at by the teachings of Gago by the dry mixing step set forth supra and that is not repeated herein.

Applicant's arguments filed February 4, 2003 have been fully considered but they are not persuasive.

The examiner maintain the position stated on record in Paper No. 6 dated October 4, 2002 that the restriction requirement is proper for the reasons made of record. The examiner's position is the same as stated in the restriction requirement that a composition with microorganism is not merely a variant of the composition of Group I, but is an entirely different invention that is in class 435, subclass 174. It would put an undue burden on the examiner too have to spend time and searches on the separate invention. The examiner's have carefully considered and evaluated applicants' position but maintains that the position that the restriction requirement is proper.

In view of applicant's amendments to claims 14, 31, and 37-38 under the rejection of 35 USC 112, the rejection is deemed moot.

In view of the examiner addition of the supported teachings for drying mixing components 1 and 2, the 102(b) and the 103(b) rejections are maintained of record.

Applicants have not produced evidence of record to the contrary that the dry coated particles of Gago are not the particles produced by the drying mixing of the two components of the instant claims. It is clearly pointed out in the rejections on record that Gago clearly envision a dry mixing step column 4, lines 15-19 as well as an aqueous mixing step with the simultaneously evaporation and spraying step which inherently produces a dry mixing step, note

column 5 lines 3-15. Also, the examiner reiterates that the instant claims are directed to a composition and not to a process for making the composition. It is the examiner's position that the prior art composition is identical to that set forth in the instant claims, and would release the phosphate coating along with the oxygen release.

Applicant argues that the field of art and intended uses of Gago's coated particles are different and non-analogous to the field of art and intended uses of the Applicant's invention. A review of the instant claims reveals that they are absence of any language or limitation to any field of art and intended uses.

Applicant's attention is drawn to MPEP 2111.02 which states that "if the body of a claim fully and intrinsically sets forth all the limitations of the claimed invention, and the preamble merely states, for example, the purpose or intended use of the invention, rather than any distinct definition of any of the claimed invention's limitations, then the preamble is not considered a limitation and is of no significance to claim construction." Furthermore, MPEP 2111.02 states that statements in the preamble reciting the purpose or intended use of the claimed invention must be evaluated to determine whether the purpose or intended use results in a structural difference between the claimed invention and the prior art. Only if such structural difference exists, does the recitation serve to limit the claim. If the prior art structure is capable of performing the intended use, then it meets the claim. Thus applicant's arguments are rebutted.

It is the examiner's position that the composition of the instant claims and therefore would produce the same 1, 2 and 3 advantages advanced by applicant in the bridging paragraph of pages 13 and 14 of Paper No. 8 dated February 4, 2003.

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On pages 14-22 of the Paper No. 8 dated February 4, 2003 applicants continues to argue intended use and non-analogous art. The argument is deemed moot in view of the examiner's position set forth supra in reference to the MPEP 2111.02 that the instant claims are absent of any intended use, and further if present would not present any structural difference. The secondary references are maintained for this teaching as set forth in Paper No. 6, dated October 4, 2002.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

This application contains claims 19-20, 35-36 and 39-47 drawn to an invention nonelected with traverse in Paper No. 5. A complete reply to the final rejection must include cancellation of nonelected claims or other appropriate action (37 CFR 1.144) See MPEP § 821.01.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Margaret B. Medley whose telephone number is (703) 308-2518. The examiner can normally be reached on Monday--Friday from 7:30 a.m. to 6:30 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Vasu Jagannathan can be reached on (703) 306-2777. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9310 for regular communications and (703) 872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

M.B. Medley/dh  
April 23, 2003

  
**MARGARET MEDLEY**  
**PRIMARY EXAMINER**